



FH
[REDACTED]

**STATE OF WISCONSIN
Division of Hearings and Appeals**

In the Matter of

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

DECISION

CWA/157984

PRELIMINARY RECITALS

Pursuant to a petition filed May 30, 2014, under Wis. Admin. Code § HA 3.03, to review a decision by the Bureau of Long-Term Support in regard to Medical Assistance (MA), a telephonic hearing was held on September 30, 2014.

The issues for determination are whether this administrative law judge has jurisdiction to determine petitioner's supportive home care (SHC) rate and whether the IRIS agency correctly denied petitioner's weekly hair care services and monthly internet service.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Petitioner's Representative:

Attorney Scott P. Phillips
633 W. Wisconsin Ave., Suite 605
Milwaukee, WI 53203-1918

Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, Wisconsin 53703

By: Carrie Haugen, Quality Services Specialist
Bureau of Long-Term Support
1 West Wilson

Madison, WI

ADMINISTRATIVE LAW JUDGE:

Kelly Cochrane
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of Milwaukee County and has been in the IRIS program since approximately March 1, 2010.
2. As part of his annual review for 2014, the IRIS agency reviewed petitioner's Individual Support and Service Plan (ISSP).
3. On May 6, 2014 the IRIS agency issued a notice to petitioner stating that it was terminating his monthly internet services and his weekly hair washes, hair cuts and beard trims.

DISCUSSION

I. SHC Rate

The Include, Respect, I Self-Direct (IRIS) program was developed pursuant to a Medical Assistance waiver obtained by the State of Wisconsin, pursuant to section 6087 of the Deficit Reduction Act of 2005 (DRA), and section 1915(j) of the Social Security Act. It is a self-directed personal care program.

The Social Security Act Section 1915(c) waiver document (available online at <http://www.cms.gov/MedicaidStWaivProgDemoPGI/MWDL/list.asp>) does indicate that the IRIS program may pay relatives to provide certain services for an IRIS participant. The waiver document also directs that participants have fair hearing rights as follows:

The State provides an opportunity to request a Fair Hearing under 42 CFR Part 431, Subpart E to individuals: (a) who are not given the choice of home and community-based services as an alternative to the institutional care specified in Item 1-F of the request; (b) are denied the service(s) of their choice or the provider(s) of their choice; or, (c) whose services are denied, suspended, reduced or terminated. The State provides notice of action as required in 42 CFR §431.210.

Appendix F-1 of the waiver document. Specifically, see <http://www.cms.gov/MedicaidStWaivProgDemoPGI/MWDL/itemdetail.asp?filterType=none&filterByDID=0&sortByDID=1&sortOrder=descending&itemID=CMS1216835&intNumPerPage=10>.

These appeal rights do not extend to providers but are for the participant. In this case there is no denial, suspension, reduction or termination of SHC services for petitioner. Rather, petitioner's guardian seeks to appeal as a provider as to a rate for those services. The Division of Hearings and Appeals does not have authority to make a decision as to providers under the Federal waiver. This determination has been upheld by the Department of Health Services in Final Decision No. CWA/133085, dated December 21, 2011.

Further, the Division of Hearings and Appeals does not possess equitable powers. *See, e.g., Wisconsin Socialist Workers 1976 Campaign Committee v. McCann*, 433 F.Supp. 540, 545 (E.D. Wis.1977). The Division of Hearings and Appeals must limit its review to the law as set forth in statutes, federal regulations, and administrative code provisions. Given the federal waiver, the Division of Hearings and Appeals may not make a substantive decision as to the rate determinations involved here. Therefore, I must conclude the Division of Hearings & Appeals does not have jurisdiction to consider petitioner's appeal of this issue.

I add that it was undisputed that participants in IRIS can manage and direct and individual service budget or may hire, manage and direct their paid workers or care providers.

II. Denial of Haircuts and Internet Service

As part of an individual's enrollment in IRIS, an ISSP is developed to have a plan for using waiver services to meet individual outcomes, assessed needs and health and safety needs. See 42 CFR §441.450(c). The federal code requires that if an agency is to provide the IRIS home and community-based services it must provide those services under a written plan of care which is subject to approval by the Medicaid agency. See 42 CFR §441.301(b)(1)(i). IRIS funds can only be used within an approved ISSP and budget, and only for services, supports or goods that meet the definitions of those services within the Waiver application.

A. Hair care

There was no dispute that petitioner requires hair care services which include a weekly wash, cut and beard trim. In determining that petitioner's haircut services should be terminated as a customized service, the IRIS agency explained that petitioner's hair care needs are funded through his Self Directed Personal Care (SDPC) services and therefore are not reimbursable as a separate customized service, as that would be duplicative. Petitioner has been receiving his hair care needs from his stepfather, who is also his SHC worker, for about the past 8 months. Prior to that time, he received in-home hair care from a barber as a customized service. At his annual review, the IRIS agency determined that the customized in-home barber services were no longer needed as he was receiving those cares under SDPC, leading to the notice giving rise to this appeal. Under his SDPC Plan, petitioner is allowed bathing and grooming assistance. See Exhibit 3. This should cover his shaving and hair washing needs as those tasks are allowed time daily. The IRIS agency also stated that the actual haircut would be covered and paid for as a SHC task, or as a last resort, as a natural support. It is noted that petitioner receives a combination of PC, SHC and day programming services that account for 24 hours/day of care under IRIS.

Petitioner's guardian's argument was that she wanted to have a barber come in again to the home to provide the service for petitioner. Petitioner's guardian testified that petitioner's stepfather/SHC worker has been providing the haircuts for approximately the past 8 months or since the time the previous barber walked off the job. Her argument is that a barber should get paid as a barber for the service as a customized good or service. However, she also testified that all of petitioner's cares were being met under the PC/SHC/day programming hours now allotted, along with the hair cares, because the hair care service (as a customized good and service) was continued pending the outcome of this decision. When asked what would change for petitioner if the service was discontinued, she testified that petitioner would not get any more haircuts because petitioner's stepfather/SHC worker was only doing this on a temporary basis since the previous barber walked out. She also testified that they did not have a barber yet that would be willing to come into the home for the petitioner. It is undisputed that petitioner has behaviors that cause his bodily fluids and feces to get in his hair as well as rashes around his ears, and thus, the hair cares are needed to facilitate cleanliness, prevent infection, boost his self-esteem and improve his behavior.

IRIS's response to the testimony was that *if* IRIS agreed and petitioner elected to have a barber come in to provide the cares, then the SHC hours should decrease by one hour as the cares had been provided in the time allotted with no evidence to suggest that any cares were not being met. There is no information in this record to show that there is some special need to require an outside barber to perform the hair cut; the stepfather has been providing the cuts for 8 months and there is no evidence to suggest that he cannot perform the service adequately for petitioner's needs. The evidence before me indicates that all of petitioner's needs are being met through the time allowed now.

Further, the agency's policy, "IRIS Funding for Goods, Supports and Services", states that Customized Goods or Services, which the hair cares are considered, refers to a good that enhances the participant's opportunities to achieve outcomes related to living arrangement, relationship, community inclusion, work

and functional or medical status. Exhibit 9. Further, each good selected must meet *each* of the following four criteria:

1.
 - a. The item or service is designed to meet the participant's functional, vocational or medical or social needs and also advances the desired outcomes in his/her Individual Service Plan;
 - b. The service, support or good is documented on the Individual Service Plan;
 - c. The service, support or good is not prohibited by Federal and State statutes and regulations, including the State's Procurement Code;
 - d. The service, support or good is not available through another source or experimental in nature.

AND [at least one of the following criteria]:

2.
 - a. The service, support or good will maintain or increase the participant's safety in the home or community environment;
 - b. The service, support or good will decrease or prevent increased dependence on other Medicaid-funded services;
 - c. The service, support or good will maintain or increase the participant's functioning related to the disability;
 - d. The service, support or good will maintain or increase the participant's access to or presence in the community.

Id.

I find that the hair cares have been shown to be available through another source. Under his SDPC Plan, petitioner is allowed bathing and grooming assistance to cover his shaving and hair washing needs as those tasks are allowed time daily. IRIS also agreed that the actual haircut would be covered and paid for as a SHC task, or as a last resort, as a natural support. Again, there is no dispute he needs these services, that he is receiving them as needed, without interruption or stoppage of other medically necessary cares, and meeting his outcomes. In sum, I find that the preponderance of the evidence supports a finding that the IRIS agency correctly terminated the hair cares as a Customized Good or Service.

B. Internet

The IRIS agency determined that it was going to terminate the monthly internet service for petitioner as it was their understanding that he was using the internet for relaxing and socializing and that there was no established goal for education or a daily living skills plan to show that there was a need for this service. The petitioner's guardian testified that the internet is not used for entertainment purposes but rather for educational and communicative goals.

Information about petitioner's communication reveals that he cannot read or write and that he is a visual and auditory learner. See Exhibit 10. The evidence also shows he has a Full Scale IQ of 51 and that he can communicate his basic wants and needs. See Exhibit 8. Despite this, petitioner's post-hearing submittal states that he uses the internet to enhance his reading and language skills, and that by selecting reading programs he is able to learn about the world around him. Information submitted by his former teacher proposes that there are many educational websites and programs available to him. See Exhibit 10. However, nothing shows what programs or websites he is actually using or that he would be able to navigate those programs independently. His teacher also writes that without the internet he could lose some of his skills, but no skills are identified. *Id.*

Part of the problem here arises from the information in the Plan Review Form and ISSP indicating the internet is for relaxation, socialization and educational purposes. See Exhibits 4 and 7. No educational purposes have been identified. That information also states that he has shown his caregivers what he has found on the internet and thereby has communicated his likes and interests. *Id.* For instance, his guardian testified that he can show his caregivers icons on the computer and express what he would like to eat or what he would like to wear, and that this kind of interaction provides him with an ability to communicate about things that he normally could not. This contradicts the information from the PCST which states that petitioner can communicate his basic wants and needs. If petitioner has communication or educational goals, those should be identified specifically so that IRIS can evaluate those goals and attempt to decide what services could accommodate them.

In all, it sounds to me like petitioner is using the computer like a PECS system which is an augmentative/alternative communication package for individuals with developmental disabilities. PECS does not require complex or expensive materials. PECS teaches an individual to give a picture of a desired item to a communicative partner, who then honors the exchange as a request. The pictures or icons do not require internet usage. This may be of value to petitioner if communication is identified as an outcome and this kind of communication style is determined to meet that outcome.

As stated on his ISSP for the internet usage, "I use home entertainment for relaxation, socializing with others and for educational purposes which helps me live a fulfilled life." Exhibit 7. Petitioner's guardian testified that he does not use the internet for entertainment or socializing, and there is no evidence to show that there is any educational purpose. In sum, I do not find that the internet has been shown to meet the petitioner's functional, vocational, medical or social needs or that it also advances the desired outcomes in his ISSP, which is required under the Customized Good and Services policy. Accordingly, I find that the agency correctly terminated this service.

CONCLUSIONS OF LAW

1. The Division of Hearings and Appeals does not have jurisdiction to determine petitioner's supportive home care (SHC) rate.
2. The IRIS agency correctly denied petitioner's weekly hair care services as a Customized Good or Service.
3. The IRIS agency correctly denied petitioner's monthly internet service as a Customized Good or Service.

THEREFORE, it is

ORDERED

The petition for review herein is dismissed.

REQUEST FOR A REHEARING

This is a final administrative decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a rehearing. You may also ask for a rehearing if you have found new evidence which would change the decision. Your request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

To ask for a rehearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875. Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST." Your request for a rehearing must be received no later than 20 days after the date of the decision. Late requests cannot be granted.

The process for asking for a rehearing is in Wis. Stat. § 227.49. A copy of the statutes can be found at your local library or courthouse.

APPEAL TO COURT

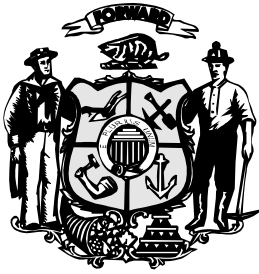
You may also appeal this decision to Circuit Court in the county where you live. Appeals must be served and filed with the appropriate court no more than 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

For purposes of appeal to circuit court, the Respondent in this matter is the Department of Health Services. After filing the appeal with the appropriate court, it must be served on the Secretary of that Department, either personally or by certified mail. The address of the Department is: 1 West Wilson Street, Room 651, Madison, Wisconsin 53703. A copy should also be sent to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for appeals to the Circuit Court is in Wis. Stat. §§ 227.52 and 227.53.

Given under my hand at the City of Milwaukee,
Wisconsin, this 27th day of October, 2014

\sKelly Cochrane
Administrative Law Judge
Division of Hearings and Appeals



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on October 27, 2014.

Bureau of Long-Term Support
Attorney Scott Phillips